Datuk Bandar Kuala Lumpur v Abdul Aziz bin Mohamed Ginan & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–01–16 OF 2007 B
ZULKIFLI, RAUS SHARIF AND HELILIAH JJCA
18 APRIL 2007

Civil Procedure — Injunction — Balance of convenience — Squatters occupying land involved in a highway project — Whether project of public interest — Whether damages awarded, if any measurable and capable of being valued C

The plaintiffs/respondents claimed they were occupiers of certain pieces of land in Kuala Lumpur. The plaintiffs alleged that the defendant/appellant had given recognition as to the existence of their Kampung and one good example was the fact that the road signboards put up by the defendant acknowledging their Kampung. In the suit filed against the defendant the plaintiffs contended that the notices served by the defendant pursuant to the Essential (Clearance of Squatters) Regulations 1969 ('the Regulations') to evict them from their homes were invalid. The plaintiffs also contended that they were equitable licencees on the said land by virtue of the encouragement by the Government in allowing them to stay therein over a period of time and in consequence of which they had incurred expenditure on the structures erected on the said land. It was the contention of the defendant that the plaintiffs' squatter huts were located on State land. The squatter huts or structures on the said land as alleged by the defendant were constructed by the plaintiffs without approved plans from the defendant as the local authority. As the plaintiffs had occupied State land illegally it was the policy of the Government that squatter areas should be given the necessary basic facilities until they were relocated. The defendant stated that presently the land where the plaintiffs were occupying was involved in the highway project known as 'Projek Pembinaan Lebuhraya Duta—Ulu Kelang' ('the DUKE Project'). The High Court granted interim injunctive relief to the plaintiffs. D E F G

Held, allowing the appeal: H

(1) The learned judge had erred in law and in fact in his failure to properly evaluate and address his mind on the relevant matters prevailing in this case before deciding that the balance of convenience favoured the plaintiffs. On the facts and circumstances of this case the court was more inclined to hold the view that the balance of convenience should tilt more in favour of the defendant (see para 12). I

(2) The plaintiffs were not claiming any interest on the said land. The ultimate relief sought by the plaintiffs as shown in their amended statement of claim was merely for damages to satisfy their alleged equity on the land. If that was the case then it would be a reasonable inference to state that the plaintiffs were only

A interested in compensation. Such damages and compensation, if any, to be awarded to the plaintiffs were definitively measurable and capable of being valued (see para 13).

(3) The DUKE Project is of public interest as the purpose is to ease the traffic flow in the city of Kuala Lumpur. The interim injunction pending trial which was B granted by the learned judge would cause the DUKE Project to be delayed or abandoned as the full trial would take some considerable time to be concluded. The defendant in this case is a public authority performing duties to the public and on this premise the balance of convenience would have to lean in favour of the defendant in not granting the injunction sought for by the plaintiffs C (see para 14).

(4) No undertaking to pay damages had been given by the plaintiffs. The defendant further stated that from the date of the ad interim injunction given on 22 September 2006 until 6 February 2007 the concessionaire company had incurred losses of about RM25m. These losses would in turn D caused financial implications to the government. On the other hand the defendant or the concessionaire company was in a financial position to pay damages to the plaintiffs in the event the plaintiffs ultimately succeed at the full trial (see para 16).

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[Bahasa Malaysia summary

Plaintif-plaintif/responden-responden mendakwa bahawa mereka adalah penghuni di beberapa keping hartanah di Kuala Lumpur. Plaintif-plaintif mengatakan bahawa F defendan/perayu telah mengiktiraf kewujudan kampung mereka dan salah satu contoh ialah fakta bahawa papan tanda jalan yang diletak oleh defendan mengiktiraf kampung mereka. Dalam saman yang difailkan terhadap defendan, plaintif-plaintif berhujah bahawa notis-notis yang disampaikan oleh defendan menurut Peraturan-Peraturan Penting (Pembasmian Setinggan) 1969 ('Peraturan tersebut') G untuk mengusir mereka daripada rumah mereka adalah tidak sah. Plaintif-plaintif juga berhujah bahawa mereka adalah pemegang lesen berekuiti atas tanah tersebut yang digalakkan oleh Kerajaan dalam membenarkan mereka menghuni di tempat tersebut untuk satu jangka masa dan hasil dari itu mengakibatkan perbelanjaan pada struktur-struktur yang dipasang di tanah tersebut. Ia adalah hujahan defendan H bahawa rumah setinggan plaintif-plaintif adalah di atas tanah kerajaan negeri. Rumah-rumah setinggan ataupun struktur-struktur atas tanah tersebut seperti yang dikatakan oleh defendan dibina oleh plaintif-plaintif tanpa pelan-pelan kebenaran daripada defendan sebagai badan berkuasa. Oleh kerana plaintif-plaintif telah menduduki tanah Kerajaan secara menyalahi undang-undang ia adalah polisi I Kerajaan bahawa kawasan-kawasan setinggan diberikan kemudahan asas sehingga mereka dipindahkan. Defendan menyatakan bahawa buat masa kini tanah di mana plaintif-plaintif menduduki adalah terlibat dengan satu projek lebuh raya yang dikenali sebagai 'Projek Pembinaan Lebuhraya Duta–Ulu Kelang' ('Projek DUKE'). Mahkamah Tinggi telah memberikan relif injunktif interim kepada plaintif-plaintif.

Diputuskan, membenarkan rayuan tersebut:

(1) Hakim mahkamah bijaksana telah terkhilaf di sisi undang-undang dan fakta dalam kegagalannya untuk menilai secara betul dan menumpukan perhatiannya kepada perkara-perkara yang relevan dalam kes ini sebelum memutuskan atas imbangan kemudahan yang memihak kepada plaintif-plaintif. Atas fakta-fakta dan keadaan-keadaan kes ini, mahkamah lebih berpendapat bahawa imbangan kemudahan sepatutnya lebih memihak kepada defendan (lihat perenggan 12).

(2) Ia patut diperhatikan bahawa plaintif-plaintif tidak menuntut kepentingan ke atas tanah tersebut. Dasar relif yang dituntut oleh plaintif-plaintif seperti yang dinyatakan di dalam pernyataan tuntutan pindaan mereka hanya untuk ganti rugi untuk memenuhi ekuiti yang dikatakan itu atas tanah tersebut. Sekiranya itu adalah kes maka ia adalah satu inferens yang munasabah untuk menyatakan bahawa plaintif-plaintif hanya berminat dalam pampasan. Ganti rugi dan pampasan, sekiranya ada, untuk diawardkan kepada plaintif-plaintif tentunya dapat diukur dan dinilai (lihat perenggan 13).

(3) Projek DUKE adalah demi kepentingan rakyat oleh kerana tujuannya ialah untuk mengurangkan kesesakan trafik di Bandaraya Kuala Lumpur. Injunksi interim sementara menunggu perbicaraan yang diberikan oleh hakim yang bijaksana tersebut akan menyebabkan Projek DUKE ditangguhkan ataupun diabaikan oleh kerana perbicaraan penuh akan memakan masa yang lama untuk diputuskan. Defendan dalam kes ini adalah badan berkuasa yang menjalankan tugas-tugasnya kepada masyarakat dan atas premis ini imbangan kemudahan berpihak kepada defendan dalam tidak memberikan injunksi yang dituntut oleh plaintif-plaintif (lihat perenggan 14).

(4) Tiada aku janji untuk membayar ganti rugi diberikan oleh plaintif-plaintif. Defendan juga telah menyatakan bahawa dari tarikh injunksi interim diberikan pada 22 September 2006 sehingga 6 Februari 2007 syarikat konsesi tersebut telah mengalami kerugian sebanyak RM25 juta. Kerugian-kerugian ini kemudiannya akan menyebabkan implikasi kewangan kepada kerajaan. Sementara defendan atau syarikat konsesi berada dalam kedudukan kewangan yang baik untuk membayar ganti rugi kepada plaintif-plaintif sekiranya plaintif-plaintif pada akhirnya berjaya di perbicaraan penuh (lihat perenggan 16).]

Notes

For cases on balance of convenience, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2577–2582.

Cases referred to

American Cyanamid v Ethicon Ltd [1975] 1 All ER 504 (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Smith & Ors v Inner London Education Authority [1978] 1 All ER 411 (refd)

Legislation referred to

Essential (Clearance of Squatters) Regulations 1969 reg 4

Appeal from: Civil Suit No S3–21–221 of 2006 (High Court, Kuala Lumpur)

B Thangaraj (YC Lee with him) (Thangaraj & Associates) for the appellant/defendant.
R Sivarasa (Ravi Nekoo, Cheng Poh Heng and K Parameswary with him) (Cheng Poh Heng & Co) for the respondents/plaintiffs.
K Siva Balan (Konsortium Lebuhraya Utara-Timur Kuala Lumpur Sdn Bhd) watching brief.

Zulkefli JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the defendant against the decision of the High Court at Kuala Lumpur granting the interim injunctive reliefs sought by the plaintiffs under their application filed by way of summons in chambers ('encl 4'). The plaintiffs filed the writ and statement of claim on 8 September 2006. Enclosure 4 was filed on the same day on 8 September 2006 and under it the plaintiffs sought the following reliefs:

(i) Satu Injunksi Interim bahawa defendan dihalang, sama ada ia sendiri, dan/atau pekerja-pekerja mereka dan/atau agen-agennya dari bertindak ke atas notis-notis yang dikeluarkan oleh defendan tersebut dengan memasuki dan merobohkan rumah, atau apa-apa bangunan yang telah didirikan oleh plaintif-plaintif di Lot 28137 sehingga selesai perbicaraan prosiding ini dan/atau sehingga perintah selanjutnya dari mahkamah ini.

(ii) Satu Injunksi Interim bahawa defendan dihalang, samada ia sendiri, dan/atau pekerja-pekerja mereka dan/atau agen- agennya daripada mengeluarkan sebarang notis di bawah Peraturan-Peraturan Perlu (Pembersihan Setinggan-Setinggan) 1969 ke atas plaintif-plaintif tersebut sehingga selesai perbicaraan prosiding ini dan/atau sehingga perintah selanjutnya dari mahkamah ini.

[2] Enclosure 4 was fixed for hearing on 22 September 2006. Upon an oral application by the plaintiffs' counsel for an ad interim injunction, the learned judge after hearing submissions from both parties granted an ad interim injunction in favour of the plaintiffs pending the disposal of encl 4. Subsequently after hearing submissions from both parties on the substantive application as in encl 4, the learned judge on 6 February 2007 made an order in terms of the application.

BACKGROUND FACTS OF THE CASE AND CONTENTION OF THE PARTIES

[3] The relevant background facts of the case are as follows.

[4] Plaintiffs No 1 to 85 claimed they are occupiers of Kampung Semarak, Kuala Lumpur whilst plaintiffs No 86 to 109 claimed they are occupiers of Kampung Loke Yew, Kuala Lumpur. In the early 1970's, about fifty persons had started constructing structures on the land which is now known as Kampung Semarak. There are various facilities provided for Kampung Semarak which includes workshop, kindergarten,

community centre, roads, 'surau', water, electricity and telephone. The plaintiffs alleged that the defendant had given recognition as to the existence of Kampung Semarak and one good example is the fact that the road signboards put up by the defendant in the locality referred it as 'Kampung Semarak'. In the suit filed against the defendant the plaintiffs contended that the notices served by the defendant pursuant to the Essential (Clearance of Squatters) Regulations 1969 ('the Regulations') to evict them from their homes are invalid. The plaintiffs also contended that they are equitable licencees on the said land by virtue of the encouragement by the Government in allowing them to stay therein over a period of time and in consequence of which they had incurred expenditure on the structures erected on the said land.

[5] It is to be noted in the amended statement of claim, the final reliefs sought by the plaintiffs are as follows:

(a) Satu deklarasi bahawa wujudnya satu ekuiti bagi pihak plaintif-plaintif yang mana ekuiti tersebut meliputi nilai perbelanjaan pengubahsuaian tanah, rumah (termasuk kedai dan gerai), harga semasa rumah (termasuk kedai dan gerai)mereka serta kos pemindahan.

(b) Satu deklarasi bahawa plaintif-plaintif mempunyai hak milikan eksklusif ke atas tanah tersebut selagi hak ekuiti mereka itu tidak ditunaikan melalui tawaran membeli rumah, dan pembayaran pampasan dan gantirugi yang perlu ditaksir.

(c) Satu injunksi menghalang defendan samada secara sendiri dan/atau pekerja-pekerja mereka dan/atau ejen mereka dari memasuki dan merobohkan rumah dan apa-apa bangunan yang telah didirikan oleh plaintif-plaintif di GRN 55820, No. Lot 28137, Mukim Setapak, Daerah Kuala Lumpur.

(d) Relif lain yang sewajarnya.

(e) Kos.

[6] For the defendant its defence against the action filed by the plaintiffs essentially is that the plaintiffs are squatters and have continued to occupy State land. As the plaintiffs have occupied State land illegally it was the policy of the Government that squatter areas would be given the necessary basic facilities until they are relocated. The defendant stated that presently the land where the plaintiffs are occupying is involved in the highway project known as 'Projek Pembinaan Lebuhraya Duta-Ulu Kelang' ('the DUKE Project'). The DUKE Project is well described in para 7 of the affidavit in reply of the defendant (encl 9) as follows:

> 7. Perenggan 14 Afidavit plaintif (1) adalah diakui dan defendan akan selanjutnya menyatakan bahawa Lebuhraya Duta – Ulu Kelang (selepas daripada ini dirujuk sebagai 'DUKE') adalah projek yang dilaksanakan oleh Kerajaan Malaysia. Perkara-perkara berkaitan projek DUKE adalah seperti berikut:
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> 7.1 Lebuhraya DUKE sepanjang lapan belas (18) kilometer yang bermula dari North Klang Valley Expressway (NKVE) di Jalan Duta dan berakhir di Jalan Lingkaran Tengah II (MRR II) di sebelah timur Kuala Lumpur dan Batu Caves di sebelah utara. Lebuhraya ini direkabentuk dengan lapan (8) dan enam (6) laluan dua (2) hala. Pembinaan DUKE akan dilengkapi dengan tujuh (7) persimpangan bertingkat dan empat (4) laluan susur keluar masuk.

7.2 DUKE merupakan sebahagian dari rancangan Kerajaan Pesekutuan bagi Pelan Induk Jalan Raya Kuala Lumpur yang akan melengkapkan jalan-jalan lingkaran dari jejari bandaraya untuk mengurangkan kesesakan trafik. Justeru itu, DUKE dikenal pasti sebagai 'PENYAMBUNG HUBUNGAN UTAMA' untuk jalan-jalan lingkaran perantaraan di dalam Pelan Induk Jalan Raya. Hubungan ini adalah penting untuk jalan raya di bahagian timur-barat di sebelah utara Kuala Lumpur yang menyediakan laluan alternative untuk mengelakkan trafik dari menggunakan jalan pusat bandaraya. Ianya juga merupakan skim penyuraian trafik ke kawasan pinggiran melalui penyambungan ke jalan-jalan jejari seperti Jalan Segambut, Jalan Kuching, Jalan Sentul, Jalan Semarak, Jalan Setiawangsa, Jalan 37/56 dan Jalan Bandar Dalam.

7.3 Lebuhraya ini mempunyai ciri-ciri terkini Informasi Trafik dan Pengurusan Sistem (MIS) dan dilengkapi dengan kelengkapan moden seperti Sistem Pesanan Maklumat Berubah (VMS), Pusat Kawalan dan Sistem Pemantauan Berpusat dan Tol Elektronik. Sistem tol terbuka akan digunakan agar pengguna lebuhraya DUKE akan hanya dikenakan tol sekali saja untuk kesemua destinasi. Empat puluh enam peratus (46%) dari lebuhraya ini adalah bebas tol, termasuk Persimpangan Bertingkat Duta ke Persimpangan Bertingkat Kuching, Persimpangan Bertingkat Setiawangsa ke Persimpangan Bertingkat Hill View dan Persimpangan Bandar Dalam sehingga ke Persimpangan Bertingkat Greenwood.

7.4 DUKE mempunyai tiga (3) hubungan utama iaitu:

(a) HUBUNGAN DUA bermula selepas Plaza Tol NKVE akanmemberi keselesaan perjalanan tanpa halangan dari Duta dan SriHartamas ke arah timur dan laluan hubungan terus dari kawasan sesak dengan bersambung dari Jalan Segambut, Jalan Kuching dan Jalan Sentul.

(b) HUBUNGAN ULU KELANG bersambung dari arah timur merentasi jalan-jalan jejari seperti Jalan Semarak, Jalan Setiawangsa dan Jalan Ulu Kelang/MRR II. Hubungan ini akan dapat mengurangkan kesesakan dari kawasan tersebut dengan menyambungkan haluan ke Lebuhraya DUKE.

(c) HUBUNGAN KARAK bermula dari Hubungan Duta/Ulu Kelang dan di selatan pinggiran yang berpusat di Batu Caves serta juga perjalanan jarak jauh ke Genting, Karak dan pantai timur.

[7] It is the contention of the defendant that as at 28 August 2006, the plaintiffs' squatter huts are located on State land. The squatter huts or structures on the said land as alleged by the defendant were constructed by the plaintiffs without approved plans from the defendant as the local authority. The defendant has duly issued notices pursuant to the provision of reg 4 of the Regulations to the plaintiffs by giving seven days notice for the plaintiffs to demolish the squatter huts but the plaintiffs have refused to move out of the said land. It is the defendant's case that the balance of convenience favours the defendant in not granting the injunctive reliefs sought for by the plaintiffs.

DECISION OF THIS COURT

[8] At the outset we would state here that the learned judge had comprehensively dealt with all the relevant issues canvassed by both parties in his grounds of judgment. The learned judge had stated that he had applied the principles as laid down in *American Cyanamid v Ethicon Ltd.* [1975] 1 All ER 504 and *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 in granting

the interlocutory injunction to the plaintiffs pending the hearing and determination of the action filed by the plaintiffs. The learned judge found that there are serious issues or questions to be tried and amongst the serious questions to be tried are as follows:

(a) whether the land on which the plaintiffs' houses are sited is State land, or whether it is alienated land;

(b) assuming that the land is State land, whether the plaintiffs are by virtue of reg 4 of the Regulations, entitled to be given reasonable notice of the intended demolition;

(c) assuming that the land is State land and the plaintiffs are entitled to be given reasonable notice, whether the notice issued is a reasonable and proper notice for the purpose of reg 4;

(d) assuming that the land is State land and that the plaintiffs are entitled to be given reasonable notice, whether the notice was properly served on the plaintiffs; and

(e) whether the DUKE Project is a Government project or whether it is a private project.

[9] We do not think we could detect any flaw in respect of the above findings made by the learned judge as to the fact that there are serious issues or questions to be tried. Based on the plaintiffs' pleadings and affidavits filed by both the parties, the learned judge was justified in the circumstances of the case at that stage of the proceedings to have made such findings. We are therefore of the view the merits of the case for the respective parties on those triable issues raised should be litigated and decided at the trial proper.

[10] However, it is our judgment that we find the learned judge in this case had failed in his evaluation of the relevant matters to be taken into account in deciding whether to grant the said interim injunctive reliefs after finding that there are serious issues or questions to be tried. There is the pertinent question of having to decide on the balance of convenience or more aptly referred to as where the justice of the case lies. The principle of law on this point is well established as laid down in the case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* wherein Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal inter alia stated as follows (at p 207):

> having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by its grant, against the harm that would result from its refusal and the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and to maintain the status quo. It is a judicial discretion capable of correction on appeal. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

[11] On the issue of balance of convenience in the present case the learned judge in his grounds of judgment inter alia had this to say:

> In my judgment the balance of convenience favours the plaintiffs. If the interlocutory injunction is not allowed they are going to lose their homes. The plaintiffs' houses may appear humble. But there is an English saying that an Englishman's home is his castle. I will say that every man's home is his castle. This is a universal human value. A person's home how small and simple it is, still, it means everything to him and to his family. It is his life. Housing is a basic human need.

[12] With respect to the above finding of the learned judge, we find the learned judge had erred in law and in fact in his failure to properly evaluate and address his mind on the relevant matters prevailing in this case before deciding that the balance of convenience favours the plaintiffs. On the facts and circumstances of this case we are more inclined to hold the view that the balance of convenience should tilt more in favour of the defendant on the grounds as follows:

[13] Firstly, it is to be noted that the plaintiffs are not claiming any interest on the said land. The ultimate relief sought by the plaintiffs as shown in their amended statement of claim are merely for damages to satisfy their alleged equity on the land. If that is the case then it would be a reasonable inference to state that the plaintiffs are only interested in compensation. Learned counsel for the defendant on this point submitted that looking at the photographs of the squatter huts (see pp 511–589 of Appeal Record (Vol 2) occupied by the plaintiffs, the said squatter huts are temporary in nature and the costs of each squatter huts would barely amount to about RM2,000 per squatter hut. Learned counsel for the defendant contended that if it is just a matter of money then damages would be an adequate remedy if the plaintiffs succeed in proving their claim on the basis of their alleged equitable interest on the said land. The learned judge however did not agree and his grounds of judgment he posed the question that in the event at the conclusion of the trial the court were to make a finding that the demolition of the houses were unlawful how are the compensation to be determined? Again with respect, we do not agree with the learned judge's view on this issue. We are of the view looking at the final reliefs sought for by the plaintiffs which is plainly in terms of monetary value, such damages and compensation, if any, to be awarded to the plaintiffs are definitively measurable and capable of being valued. The plaintiffs are claiming amongst others the current value of their occupied homes, improvement made on the land and cost of moving out of their homes.

[14] Secondly, we have to consider that the DUKE Project is of public interest as the purpose is to ease the traffic flow in the city of Kuala Lumpur. The interim injunction pending trial which was granted by the learned judge would cause the DUKE Project to be delayed or abandoned as the full trial would take some considerable time to be concluded. The defendant in this case is a public authority performing duties to the public and on this premise we would venture to state that the balance of convenience would have to lean in favour of the defendant in not granting the injunction sought for by the plaintiffs (see the case of *Smith & Ors v Inner London Education Authority* [1978] 1 All ER 411).

[15] Thirdly, the plaintiffs are provided with alternative accommodation by the defendant for moving out of the said land whereby the plaintiffs are to rent a three room apartment at 'Projek Perumahan Rakyat DBKL Sri Semarak' which was constructed within the vicinity of the plaintiffs' squatters huts. The rent is at a minimal rate of RM124 per month. Apart from alternative accommodation being provided, each family units are to be paid an ex gratia sum of RM2,000. The defendant will also provide labour, lorries and boxes to the plaintiffs to relocate. The plaintiffs would therefore be living in a better living condition at the modern building and facilities at the said 'Projek Perumahan DBKL Sri Semarak' as opposed to the present squatter huts. It is to be noted here that a majority of those who have stayed previously on the same said land where the plaintiffs are staying have already moved out wherein they have responded to the relocation plan to stay at 'Projek Perumahan DBKL Sri Semarak' as arranged by the defendant.

[16] Fourthly, no undertaking to pay damages have been given by the plaintiffs. In any event, any undertaking by the plaintiffs would remain a mere undertaking as the plaintiffs are not in any financial position to pay damages. For the defendant it has stated that losses of about RM165,000 per day is incurred by the Concessionaire Company assigned to construct the DUKE Project for the delay in taking possession of the site where the plaintiffs squatter huts are located. The defendant further stated that from the date of the ad-interim injunction given on 22 September 2006 until 6 February 2007 the Concessionaire Company has incurred losses of about RM25m. In our view these losses would in turn cause financial implications to the Government. On the other hand the defendant or the Concessionaire Company is in a financial position to pay damages to the plaintiffs in the event the plaintiffs ultimately succeeds at the full trial.

Conclusion

[17] For the reasons already stated we would allow the defendant's appeal. The order of the learned judge dated 6 February 2007 is hereby set aside. In the circumstances of the case we are not making any order as to the costs arising from this appeal. The deposit paid by the defendant for this appeal is to be refunded to the defendant.

Appeal allowed.

Reported by Sally Kee